

## Criminal law and change

Dr. Kartikeya Misra

Dept. of Political Science, University of Allahabad, Allahabad, Uttar Pradesh, India

### Abstract

There are two conflicting approaches to the function of criminal law- a question that is at the bottom of much of the contemporary controversy about the uses of criminal law. At one end of the spectrum, there are what we may call the fundamentalists. To them the function of the criminal law is essentially that of the defender and protector of moral values. Generally, this approach goes together with the emphasis on guilt as the determining element of criminal behaviour, and with a retributive theory of punishment. It has, however, two aspects: one is the retribution, the revenge of society upon the criminal. The other is the atonement, the expiration of the criminal for the sins which he has committed against society.

**Keywords:** criminal law, controversy, criminal behavior

### Introduction

At the other end of the spectrum, the utilitarian approach sees criminal law and the criminal sanction essentially as one of a large number of devices by which society protects itself against injury done to it by certain kinds of behaviour. Its premise is that punishment, as an infliction of pain, is unjustifiable unless it can be shown that more good is likely to result from inflicting than from withholding it. For this approach, guilt, i.e. the characterization of certain kinds of behaviour as evil, is not necessarily a precondition of punishment<sup>[1]</sup>. It is a question of balancing the social advantages of the use of criminal law against the cost. It follows that, depending on the utility criteria, remedies other than punishment may be socially preferable<sup>[2]</sup>.

The controversy continues and has indeed been intensified by the greatly increased complexity of contemporary society, in which both the range of socially dangerous offences, and that of the possible responses to be made by society has vastly increased. The issue of the criminality of homosexual behaviour. Formed the background for a debate between Lord Devlin and Professor H.L.A. Hart. In Shaw's case, the House of Lords had gone out of its way to add to the statutory convictions a conviction for conspiracy to corrupt public morals. This provoked a pamphlet by Professor Hart which expressed a combination of the utilitarian philosophy of John Stuart Mill, with affirmation of the faith of a modern liberal<sup>[3]</sup>.

"Recognition of individual liberty as a value involves, as a minimum, acceptance of the principle that the individual may do what he wants, even if others are distressed when they learn what it is that he does - unless, of course, there are other good grounds for forbidding it."

Lord Devlin, while rejecting the platonic ideal... that "the state exists to promote virtue among its citizens", said that any community could exist only if it had a certain sense of right and wrong. Lord Devlin's approach is close to the

fundamentalist view, which emphasizes the outrage to the moral sense of the community as the basic rationale of the invocation of the criminal law; the utilitarians take public order as the limiting factor.

Obviously, the type of conduct that a particular society considers as sufficiently worthy of condemnation to prohibit it by criminal sanctions, is deeply influenced by the values governing that society. It therefore varies greatly, from one country to another, and from one period of history to another. It may suffice here to illustrate the dependence of the scope of prohibited conduct on changing values and canons of social policy, by two examples: One is the area of economic crime, where the transition from a laissez faire to a regulated and in varying degrees, publicly controlled economy has led to the condemnation and criminality of actions which, in a system of economic individualism were legitimate and perhaps praiseworthy. The converse is the case in the area of sexual behaviour, where changing attitudes and social conditions have increasingly led to the abolition of criminality for actions that were formerly severely condemned and subject to criminal sanctions<sup>[4]</sup>.

In contrast to the increasing need for criminal sanctions to combat economic risks and social offences, notably the pollution of the environment, certain types of individual behaviour, once severely condemned by prevalent concepts of morality and public order, have become widely tolerated and more acceptable to society. This is notably so in the area of sexual behaviour, as shown by the spreading abolition of criminality of homosexual conduct between consenting adult males carried out in private, and the rapidly growing number of jurisdictions that have abolished, or greatly limited, the criminality of abortion.

The greater permissiveness towards homosexuality is essentially a product of changed ideas of social morality. In most western societies, homosexual conduct, if limited to adults and carried out in private, is no longer regarded as morally so blameworthy that it deserves the attention of the

criminal law. In Britain, where a statute of 1967 abolished the criminality of this type of homosexual behaviour, the matter was fully discussed in the Report of the Wolfenden Committee, which recommended the abolition of the offence by a majority of twelve to one. Its philosophy is summed up in the following passage:

"Unless a deliberate attempt is made by society acting through the agency of the law to equate this sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business" [5].

A whole new area of criminal law has developed out of the steadily increasing responsibilities of the modern state for the maintenance of certain crucial standards demanded by the proper functioning of a modern industrialized and urbanized society. These standards are embodied in a great variety of statutory regulations. They concern safety appliances and sanitary standards in factories and mines, minimum standards in housing accommodation, purity and minimum quality of foodstuffs, drugs and medical preparations offered to the public, compliance with statutory obligations, unemployment insurance and other forms of social security, registration of professional and trade qualifications, and a multitude of other matters which have become the accepted responsibility of a properly governed contemporary state [6].

This type of offence, while going under the general label of criminal law, is of an essentially different character from the criminal offences based on individual wrongdoing. Like all law, the conditions under which criminal liability is imposed depend upon a balance of values in a given society. Even the innocent killing of a man harms the society, but the law generally considers that a severe penalty for murder or manslaughter should not be imposed, except on proof of individual guilt. Public welfare offences are, by contrast essentially standardized. In the balance of values, it is generally considered more essential that violations of traffic rules or food laws should be strictly punished, in the interests of the public, rather than that the degree of individual guilt should be measured in each case. Moreover, a vast proportion of these offences are nowadays imputable to corporations rather than individuals in such areas as social insurance obligations, safety and health standards, and the like. It is socially entirely desirable that the corporation, under whose name the business is conducted, should be the carrier of responsibility rather than the individual, although the person immediately responsible may of course, be subject to a concurrent liability [7].

What is emerging in this type of public welfare offence is a kind of 'negligence without fault' as it has developed in the law of tort within the conceptual framework of fault liability. Its purpose is to compel business to apply stricter standards of inquiry and control to transactions which may endanger public security. This is a logical and sensible development, provided we recognize the importance of public interest in this type of contravention [8].

In the approach to a generally condemned act, such as murder, rape or arson, the legal system may go from the one extreme of penalizing the act as such, without regard to subjective

factors in the individual offender, to the other extreme of complete individualization, i.e. taking each individual as a composite of moral and intellectual faculties, genetic factors, social environment. Ultimately, this is a question of values, of the balancing between the interest in the safety and vigour of the community, and the consideration of the individual as a person. In no field has the conflict of these values been more dramatically, and often tragically, tested than in the treatment of insanity or mental deficiency. Persons thus afflicted are unquestionably a burden to society. But while some modern legal systems have gone a long way towards substituting alternative social sanctions for punishment, in the case of insane or mentally deficient persons as well as of juveniles, first offenders, and other special categories, none has held it possible to abolish the criminal law as a major and vital instrument of protection of society. The almost infinite variety of psychopathic disturbances, and still continuing and widening scope of psychiatric study of mental disturbances adds to the complexity of the problem [9].

Somewhere, society must draw the borderline and hold a person guilty of a crime, even though psychiatrists may regard the offender as a very disturbed human being, and philosophers may deny the 'free will' to choose between right and wrong.

Generally speaking, the increasing understanding of the social and psychological causes of crime has led to a growing emphasis on reformation rather than deterrence in the older sense, as the best way to protect both the individual criminal from himself and society from the incidence of crime. In practical terms, this has meant the increasing use of corrective and educational measures, either in addition to, or in substitution for punishment proper.

The study of crime must be brought into a closer connection with psychiatry, psychology and social science. We have to think increasingly of criminal law as only one of a variety of instrumentalities, by which public authority deal with the complex and manifold problems of order in contemporary industrial society.

There must be a much closer coordination of criminal, administrative and civil procedures, with respect to the effect that they have on the status of the individual. While the criminal law proper may well come to occupy a more limited place in the public sanctioning process than it has traditionally done it is imperative that the technically non-criminal sanctions be subjected to adequate procedural safeguards, so as to protect the basic rights of the individual.

## References

1. Wechsler. The criteria of criminal responsibility; 22 University of Chicago L. Rev. 1955, 374.
2. Devlin P. The Enforcement of Morals, Oxford University Press, 1965.
3. Hart HLA. Law Liberty and Morality, Stanford University Press, 1963.
4. Reiwald P. Society and Its Criminals, International Universities Press, 1950.
5. Report of the Committee on Homosexual Offences and Prostitution (Cmd 747). The Model Penal Code of the American Law Institute, published in 1962, adopts a similar philosophy by omitting private homosexuality not

- involving force, imposition or corruption of the young from the offences listed in the Model Penal Code, 1957.
6. Arens R, Lasswell HD. In Defense of Public Order: The Emerging Field of Sanction Law, Columbia University Press, 1961.
  7. See, e.g. the English Sale of Food (Weights and Measures) Act, section which directs the discharge of a defendant, where he can prove 'that such deficiency was due to a bona fide mistake or accident, or other causes beyond his control, and in spite of all reasonable precautions being taken and due diligence exercised by the said defendant to prevent the occurrence of such deficiency or was due to the action of some person over whom the defendant had no control. 1926, 12(2).
  8. For a similar view see Henry M. Hart, The aims of the criminal law; 23 Law and Contemporary Problems. 1958, 422.
  9. Packer HL. The Limits of the Criminal Sanction, Stanford University Press, 1968.